



# GRIC

## **Foundations for Prosecution Conference**

October 19 – 23, 2020  
Virtual Via Zoom

### **SEX CRIMES CASE PROSECUTION**

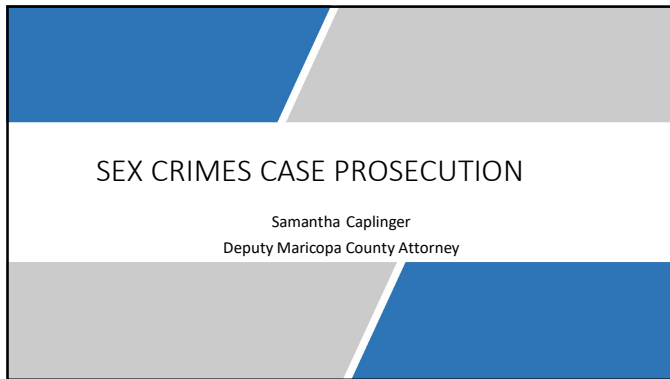
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Distributed by:

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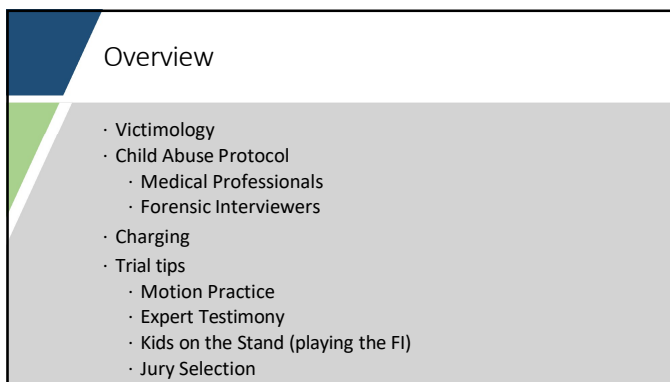
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## Victim Behavior

- Delayed disclosure
- Partial/piecemeal disclosure
- Underreporting of certain acts
- Recantation
- Fantastic disclosures
  - Exaggerated helplessness/resistance
  - Dissociation
- Script memory v. Episodic Memory

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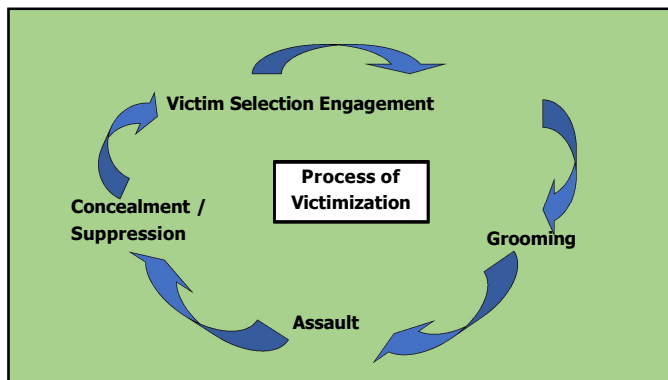
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## Example

- Defendant: School PE teacher
- Victims: Three boys, ages 11 - 12 (families here illegally)
- M.O.: D would take Vs to Castles and Coasters, buy toys, shoes, take to movie. Parents knew of this.
- Acts: Would molest one of the boys each week in the theater, also performed oral sex on 1 boy in girl's shower at school. Defendant would "rub" 2<sup>nd</sup> boy's finger.
- Defendant would tell boys: "We really shouldn't have done that."
- Woman in theater saw molest of one boy (same boy who was taken to girl's shower) and called police.
- When boy interviewed he did not mention oral sex. That disclosure was made to a counselor 2 months later.

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## Common:

- Kids delay disclosure
- Kids don't yell, scream or fight
- Offenders often abuse children with others nearby/in the room
- Do NOT always abuse every child in a family or that they have access to.

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## Adults

- Fight, Flight, Freeze Response
- Wide Range of Emotions
- Hormones flood the brain
- Delay disclosure
- Do things that don't make sense
  - Blame themselves

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### Protocol: Why?

- Children often interviewed multiple times
  - Patrol
  - Detective/Dedicated Forensic Interviewer
  - DCS/CPS
- Multiple Interviews
  - Traumatize children
  - Lead to perceived inconsistencies (weaken your case)
  - Decreased cooperation

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### Protocols Include:

1. The process for notification of receipt of criminal conduct allegations.
1. The standards for interdisciplinary investigations of abuse and neglect, including timely forensic medical evaluations.
1. The standards for interdisciplinary investigations involving native American children in compliance with the Indian Child Welfare Act.

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### Protocols Include:

4. Procedures for sharing information in a timely manner.
1. Procedures for coordination of screening, response and investigation with other involved professional disciplines and notification of case status.
1. The training required for DCS, law enforcement and prosecutors, including forensic interviewing skills.

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### Protocols Include:

- 7. The process to ensure review of and compliance with the protocols.
- 1. Procedures for an annual report to be made to the governor, the speaker of the house of representatives and the president of the senate.
- 1. Procedures for dispute resolution.

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### Joint Investigation – Cooperation in Investigations

- Team agreed upon approach
- Prompt communication
- Sharing information
- Maintain ongoing contact
- Joint monitoring of forensic interviews
- Eliminate duplication of efforts

Different from Other Investigations  
Victim-Centered Approach

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Protocol =  
Standard of  
Practice

- Most effective, efficient, and appropriate way of handling cases.
- Not a rule
- Breaking protocol does not mean no case
- TEAM effort: police, prosecutors, child protective services

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## Medical Exams

- **Medical Care** (immediate injury – healed injury)
- **Evidence Collection**
- **“Normal is normal”**

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## Forensic Interviews

- Kids younger than 7
- Kids with developmental disabilities, significant emotional and/or behavioral issues
- Chronic abuse over long period (even when victim is now an adult)
- Multiple victims (more than 2 or 3)
- Abuser is unknown to the child
- Any other situation in which the detective or CPS investigator thinks its necessary

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## Why not have others do these interviews?

- **More problematic research applies**
- **Source monitoring issues**
- **Trauma**
- **Interviewer bias claims**
- **Concrete language**
- **Script memory**
- **Jurors' perceptions**
- **Famous preschool cases (e.g., McMartin)**

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## Why Videotape a Forensic Interview

NOT: So that child does not have to testify

- To show that interview was not leading/suggestive
- To reduce pressure on victim to recant
- To reduce actual recantation
- To refresh child's memory
- To impeach if child recants
- To admit if defendant forfeits his right to confront the child witness by wrongdoing

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CHARGING

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## Types of Cases

- Sexual Assault
- Sexual Abuse
- Sexual Conduct with a Minor
- Molestation of a Child
- Indecent Exposure
- Prostitution
- Causing or Taking a Child for Purposes of Prostitution
- Promotion of Prostitution

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## Definitions

- **Sexual Contact:**
  - Direct/indirect
  - Touching
  - Genitals, anus, female breast
- **Sexual Intercourse:**
  - Penetration of penis/vulva/anus
  - Masturbatory contact with penis/vulva

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## Sexual Conduct with a Minor

- Intentionally or Knowingly
- Engages in sexual intercourse, sexual contact or oral sexual contact
- With any person under 18

Consent not an issue UNLESS victim is 15, 16 or 17: Defendant did not know and could not reasonably have known age

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## Molestation of a Child

- Knowingly
- Engages in sexual contact
- OR
- Direct/indirect fondling or manipulating
- Of genitals or anus or female breast of another

Minor under 15

Consent not an issue

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## Sexual Assault

- Intentionally or knowingly
- Engages in Sexual intercourse or oral sexual contact
- Without consent

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## Without Consent

- reasonably coerced with immediate or threatened use of force against a person or property
- incapable of consent because of mental disorder where cannot comprehend sexual nature of the conduct
  - cannot understand right to refuse to engage
  - drug/alcohol/sleep/other similar impairment of awareness AND such a condition is known or should have been known to the defendant
- intentionally deceived as to nature of the act by defendant — or deception is known/should have been known to defendant

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## Sexual Abuse

- Intentionally or knowingly
- Engages in sexual contact with any person
- Without consent

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## Kidnapping

Knowingly restrains Victim with intent to  
Inflict death, physical injury, sex offense

### Restraint:

- physical force, intimidation, deception
- moves or confines person w/o consent
- includes acquiescence of minor

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## Indecent Exposure

- Expose genitals/anus/areola or nipple of female breast
- With another person present
- Reckless about whether other person (as a reasonable person) would be offended or alarmed

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## Prostitution

· Engage in OR offers OR agrees to engage in  
Sexual intercourse or oral sexual conduct

- For money or anything of value

UP to 90 days jail

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### Causing or Taking a Child for Purposes of Prostitution

- Takes away a minor from a parent, guardian or custodian for purposes of prostitution
- Causes or uses a minor for the purposes of prostitution
- Permitting minor in your custody/control to prostitute
- Receives any benefit for procuring or placing a minor in prostitution

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### Promotion of Prostitution

- Knowingly
- Finance/compels/manages/supervises/control/solicits or offers to provide services of a prostitute

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### To Charge or not to Charge:

- Is there a crime?
  - Can you prove Defendant did it?
  - What are the anticipated defenses?
  - Can you overcome the anticipated defenses?
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- **Legal Standard:** Probable Cause
  - **Ethical Standard:** reasonable likelihood of conviction

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### Statute of limitations

- 5.103.A: 36 months after actual discovery
- 5.103.B: May be commenced at any time:
  - Sexual Assault with a deadly weapon/dangerous instrument or knowing infliction of serious physical injury AND person has a prior historical felony for a sex offenses
  - When identity of offender unknown:
    - A sexual assault
    - Sexual Conduct with a Minor under 15 years old
    - Molestation of a Child
    - Sex Abuse (when child under 15)

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### Corpus Delicti

Defendant's confession TO POLICE is inadmissible absent independent evidence, separate from the confession, that raises a reasonable inference that the crime has been committed

- **Victim's** Statements
- Eyewitness Observations
- Physical Evidence
- **Victim's** Statements to 3rd Party (if admissible)

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### Other Defenses

- Knowledge of Age, 15, 16 or 17. Could not reasonably know
- Consent
- Sexual Abuse/Molest: no sexual interest

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- Charging a single crime in multiple counts
- Ex: Deft puts his finger in V's vagina (one act)

Count 1 – Child Molest  
Count 2 – Sex Conduct with Minor

## Multiplicity

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## Multiplicity



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## Duplicity

- Charging multiple acts in a single count
- Ex: Deft touches V's genitals on several occasion  
"when she was in fifth grade"

Count 1 – Child Molest

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Duplicity



**1 count of Burglary**

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EXAMPLE

- Victim said that about a month before 7th grade, Defendant started coming in her room and molesting her while she was sleeping. He would put his hand inside her pants and underwear, rub her on the outside of her genitals and reach under her shirt and rub her breasts."
- She could not remember how many times this happened, but said it happened more than 10 times before school started. Each incident happened at her apartment. Mom kicked Defendant out, but let him return. He started the same thing at the beginning of 8th grade. Again, it happened numerous times."

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EXAMPLE

- **About a month before 7th grade, would touch genitals and breasts. Happened more than 10 times before school started.**
- **He started the same thing at the beginning of 8th grade. Happened numerous times.**
- **2 counts (1 for 7<sup>th</sup>, 1 for 8<sup>th</sup>)?**  
 @ Duplicitous

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Concern with Duplicity: Double Jeopardy

**If found not guilty, which burglary was he acquitted of?**



**1 count of Burglary**

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Specificity

**Good: Location**

- Clothing worn
- Family event

**Not as good: Holiday/birthday**

- Time of Day
- Weather
- Grade/teacher

**Every act must be charged in a separate count**  
**Victim must describe each individual incident**

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Date Ranges

 There is NO magical time frame

 Try not to exceed a year

 Longer time frame is a problem when alibi is the defense

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## Narrowing the Time Frame

- Teacher (better than grade or age)
- Events
- Age of Siblings
- Location of Others
- Movies/Television Shows

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## Example

- On or between June 1, 2015, and June 30, 2015, the defendant engaged in sexual intercourse with Susie Smith, a minor under the age of 15 (to wit: This refers to the incident that occurred in the living room at 123 Elm).

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**COUNT 2:**  
CHADUKI FAYES NOUEHED, on or between August 1, 1988 and June 1, 1989, intentionally or knowingly did molest Victim A, a child under the age of fifteen years, by engaging in sexual contact with Victim A, a child under fifteen years of age (to wit: time in the converted garage), in violation of A.R.S. §§ 13-1401, 13-1410, 13-3821, 13-610, 13-604.01, 13-701, 13-702, and 13-801.

**COUNT 3:**  
CHADUKI FAYES NOUEHED, on or between February 14, 1991 and February 13, 1992, intentionally or knowingly did engage in sexual intercourse or oral sexual contact with Victim A, who was a minor fourteen years of age or over (to wit: first incident in AMPM bathroom), in violation of A.R.S. §§ 13-1401, 13-1405, 13-3821, 31-281, 13-701, 13-702, 13-801, and 13-812.

**COUNT 6:**  
CHADUKI FAYES NOUEHED, on or between February 14, 1993 and February 13, 1994, intentionally or knowingly did engage in sexual intercourse or oral sexual contact with Victim A, who was a minor fifteen years of age or over, (to wit: last incident in AMPM bathroom), in violation of A.R.S. §§ 13-1401, 13-1405, 13-3821, 31-281, 13-701, 13-702, 13-801, and 13-812.

**COUNT 7:**  
CHADUKI FAYES NOUEHED, on or between February 14, 1993 and February 13, 1994, intentionally or knowingly did engage in sexual intercourse or oral sexual contact with Victim A, who was a minor fifteen years of age or over (to wit: last incident in AMPM bathroom), in violation of A.R.S. §§ 13-1401, 13-1405, 13-3821, 31-281, 13-701, 13-702, 13-801, and 13-812.

**COUNT 8:**  
CHADUKI FAYES NOUEHED, on or between August 1, 1988 and June 1, 1989, knowingly did molest Victim B, a child under the age of fifteen years, by directly or indirectly touching the private parts of Victim B (to wit: time in third grade), in violation of A.R.S. §§ 13-1410, 13-3821, 31-281, 13-604.01, 13-705 13-702, 13-801, and 13-812.

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## Trial Considerations

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## Motion Practice

- Motions in Limine
  - Irrelevant Information
  - Minor testimony: Make defense aware of intent to use the recording
  - Third-Party Culpability
  - Consent
  - Victim Sex History
- Substantive Motions
  - 404(B) and (C)

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## Admission of Evidence of Prior Sexual Conduct

- 5.810: opinion and reputation evidence of victim's sexual conduct SHALL NOT be admitted in prosecution under this title
- Evidence of specific instances of victim's sexual conduct shall be admissible in prosecution only to the extent that the following proposed evidence is relevant and material to a fact at issue and the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence by clear and convincing evidence
  - Testimony establishing the victim's past sexual conduct with defendant OR
  - Testimony which directly refutes physical or scientific evidence

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## Children in the Courtroom

- Consider how to organize their testimony
- Start off with conversation
- Go over the "rules" with them
- Repeat back what they say
- Have a back-up plan
  - When they cannot talk
  - When they cannot remember

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## Admissibility of Minor's Statement

- 5.812 –
  - Minor UNDER 10
  - Judge finds indicia of reliability
  - Minor testifies at trial or if unavailable the statement is admissible if corroborated

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## Expert Testimony

- Use a "blind" or "cold" expert.
- MEET with this expert to discuss areas you will be covering
- Use common language, use analogies

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## Victim Behaviors

"We cannot assume that the average juror is familiar with the behavioral characteristics of victims of child molesting . . . (e.g. recantation, conflicting versions of events, confusion or inarticulate descriptions) which jurors might attribute to inaccuracy or prevarication . . . Jurors, most of whom are unfamiliar with the behavioral sciences, may well benefit from expert testimony of the general type offered in the present case . . ."

State v. Lindsey: 149 Ariz. 472, 473-74 (App. 1986).

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## DO NOT:

- Have expert testify or argue that the victim's behavior was consistent with abuse.
- Have expert testify or argue that the defendant's behavior was consistent with abuse.
- Opine about a witness's credibility
- Quantify the chances that a witness is telling the truth.

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## Avoid Pitfalls

- Do not use same expert for two purposes
  - Forensic interviewer
  - Victimology
  - 404(C) testimony
- Avoid phrases like "majority" or "most of the time".
- Do NOT quantify or give percentages.
- Testimony should be in generalities.
- Remember: The testimony is not to diagnose, it is to explain.
- Admit limitations of testimony

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### Admit Limitations: Example

Q: Now, these factors that you were telling us about, I think you said they are not present in all cases, right?

A: That's correct.

Q: And are there some cases, child abuse cases, sexual abuse cases, in which some of the factors are present and some not?

A: That's correct.

Q: Does the presence or absence of any of these factors tell us whether or not sexual abuse occurred in a particular case?

A: No.

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### 404(B) Evidence

· evidence of other crimes, wrongs, or acts is admissible to show:

“proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.*

· 404(b) is a rule of inclusion; other act evidence is inadmissible “only when offered for the sole purpose of proving character.”

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### 404(C) Evidence

· In a criminal case in which the defendant is charged with having committed a sexual offense . . . evidence of other crimes, wrongs, or acts may be admitted by the court:

· if relevant

· to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.

· In such a case, evidence to rebut the proof of other crimes, wrongs or acts, or an inference therefrom, may also be admitted.

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## Evidence of Similar Crimes

- Judge may admit evidence that the defendant committed past acts that would constitute a sexual offense
- Judge Must weigh probative value of this evidence against the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.
- If evidence is substantially more prejudicial than probative it shall be excluded.
- NO limit on admission or consideration of evidence
- Sexual offense: sex assault, sex abuse, sex conduct with a minor, molestation of a child, or any similar offense if convicted by any jurisdiction

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## Jury Selection

- Need to tailor to these cases
- Analyze your case as a civilian would
  - Counter-intuitive behavior
  - Poor judgement
  - Morality issues (victim and/or witness)
- Think who may over-identify with your defendant

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## Common Mistakes

- Not asking tough questions
- Cross-examining the jurors
- Showing disapproval vs. fairness
- Asking "yes or no" questions
- Do not get them to just agree with you

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### Common Questions in Sex Cases:

- Experience with children (teacher, counselor, volunteer with organization)
- Child testimony
- Belief that children tell right away about sex abuse
- Sexual Abuse usually happens with a stranger
- Do you believe we have taught our children to over-react when it comes to: stranger danger/good touch- bad touch

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Have you/anyone close to you been accused of sexual offense (even if authorities not called)

Juror: My cousin reported that our grandfather molested her.

Attitude (how do you feel about that?)

- My grandfather went to prison for the rest of his life. My grandmother lost everything.

Result (were you satisfied?)

- The sentence was too harsh for an old man.
- OR: He is at fault for destroying our family.

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### Sexual Assault Questions:

- Do you believe that a person deserves to be victimized as a result of making bad choices?
- Have you or anyone close to you struggled with any type of addiction? If yes, please explain.
- Do you watch the television show "Intervention" and/or "Addicted"? If yes, please explain your general feelings about the show and subject matter.

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